No. 15086

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEWIS H. SAPER, as Trustee in Bankruptcy of Riverside Iron & Steel Corporation,

Appellant,

vs.

THOMAS A. WOOD,

Appellee.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

This is an appeal by the appellant, as Trustee in Bankruptcy of the Estates of Riverside Iron & Steel Corporation, hereinafter referred to as "Riverside" and Harlan H. Bradt, consolidated bankrupt estates, following judgment rendered against appellant by the United States District Court for the Southern District of California, Central Division, in an action brought to recover a preference allegedly obtained by the appellee.

Jurisdictional Statement.

The claim of the appellant alleged that the appellee had received a preference under Section 60 of the Bankruptcy Act (11 U. S. C. A. 96) in that within the period of four months prior to the filing of a voluntary petition in bankruptcy by Riverside in the United States Dis-

trict Court for the Southern District of New York, appellee had pursuant to a writ of execution received payment of an antecedent debt which enable the appellee to obtain a greater percentage of his debt than any other creditors in his class. The complaint further alleged that at the time of obtaining the lien and payment Riverside and Bradt were insolvent and that appellee had knowledge or reasonable cause to believe that Riverside and Bradt were insolvent. [Tr. pp. 3-6.]

Original jurisdiction of the cause was conferred upon the District Court by Section 60b of the Bankruptcy Act (11 U. S. C. A. 96) and this Court has jurisdiction of this appeal by reason of 28 U. S. C. A. 1291.

Statement of the Case.

The case was tried upon a stipulation of facts and amendment to stipulation of facts. (The entire written stipulation is set forth in the trial court's findings [Tr. pp. 37-56, incl.]) on the issue of whether appellee had any lien on the funds, admittedly received by him within the four-month period prior to bankruptcy, which antedated the four-month period. The question of whether Riverside was insolvent and appellee's knowledge of the same was left for future determination in the event that the trial court found in favor of appellant on the preliminary issues submitted to him under the written stipulation of facts. [Tr. pp. 48-49.]

The District Court originally entered judgment against the appellant on March 30, 1955. Appellant moved for a new trial. The motion was denied on December 19, 1955, but the court vacated the findings of fact and conclusions of law and judgment. [Tr. p. 36.] It thereafter made and filed new findings on January 23, 1956 [Tr.

pp. 37-60], and final judgment was entered against appellant on January 24, 1956. [Tr. pp. 61-62.]

Appellant gave notice of appeal on February 17, 1956. [Tr. p. 62.]

Statement of Facts.

On December 5, 1946, appellant filed a civil action in the Superior Court of the State of California, in and for the County of Los Angeles, to recover attorneys' fees for services rendered against Riverside. At that time he caused a writ of attachment to be levied against one E. T. Foley. [Tr. p. 38, par. I.]

Mr. Foley had earlier commenced an action in the same Superior Court against Riverside and others, in which Riverside had filed a cross-complaint, and said action was pending at the time. Foley made a return on the writ stating that he did not know whether or to what extent he was indebted to Riverside and referred to his pending action against Riverside. [Tr. p. 38.] For purposes of clarity the case involving Foley and Riverside will hereinafter be referred to as the "Foley action."

Judgment was entered in the Foley action on July 30, 1948. By the terms of said judgment Foley was ordered to and did in fact by August 1, 1948, deposit the sum of $329,263.46 with the Clerk of the Superior Court. Under the terms of the judgment Riverside was entitled to receive "upon the date when this judgment shall have become final in the Court in which this proceeding shall be finally decided . . . the sum of $82,619.69." [Tr. pp. 40-41, 49.]

On the same day that Foley deposited the money pursuant to the order of the Superior Court, Foley,

Riverside and several other attaching creditors signed a stipulation [Tr. p. 39, par. VII] which recites, insofar as it is pertinent here, that appellee had caused to be served a writ of attachment on Mr. Foley mentioned above; that Foley had made a return as recited above; and that the stipulation was not to be construed as an admission by defendants Riverside or Bradt that there is due or owing anything to anyone under the cases or attachments referred to in the stipulation. [Tr. pp. 51-54; the Stipulation was attached to the Stipulation of Facts herein as "Ex. B."]

After the deposit of the money by Foley, appellee procured another writ of attachment and had it served on the County Clerk and Clerk of the Superior Court on August 12, 1948. [Tr. p. 39.]

Thereafter in the Foley action Riverside made a motion for new trial, and the judgment was amended and entered on October 6, 1948, in Judgment Book 1967, page 163, of the Superior Court of Los Angeles County. [Tr. p. 48.]

Thereafter Riverside and Bradt took an appeal from the judgment; the case was affirmed on appeal by the District Court of Appeal of the State of California. (See *Foley v. Riverside Iron & Steel Corp.*, 99 Cal. App. 2d 431.) Riverside filed a petition for hearing in the Supreme Court of the State of California, which was denied, and its remittitur was filed in the Superior Court of Los Angeles County on November 20, 1950.

During the pendency of the Riverside appeal in the Foley action, appellee obtained judgment against Riverside in his own Superior Court action on April 8, 1949. On June 28, 1949, still during the pendency of the Riverside appeal in the Foley case, appellee caused a writ of execution to be served on the Clerk of the Superior Court. [Tr. p. 42.] The Clerk made a return stating that he held the sum of $329,263.46 on deposit in the Foley action to be distributed to various litigants, among whom Riverside was one, upon said Foley action judgment becoming final. The Sheriff returned the writ of execution "wholly satisfied." [Tr. p. 47.]

Nothing further occurred until November 21, 1950, a day after the remittitur in the Foley action had been filed, finally ended all proceedings in the Foley action. It should be noted that all the events related in the preceding paragraphs antedated the four-month period. On that day appellee again caused to be served a writ of execution on the Superior Court Clerk. The Clerk made his return stating that he held the sum of $82,219.08 on deposit "which amount is being held subject to further order of court." [Tr. p. 47.] Thereafter on December 1, 1950, appellee caused an order to show cause, returnable on December 8, 1950, to be served on the Clerk and others, requiring the Clerk to show cause why he should not be ordered to pay to the Sheriff the sums necessary to satisfy the judgment of appellee against Riverside. [Tr. pp. 42-43, 55-56.] The Superior Court thereafter on December 8, 1950, made its order directing the Clerk to pay over to the Sheriff the sums needed

to satisfy the judgment and interest, *i. e.,* the sum of $5,838.49, and Wood on January 3, 1951, received the sum of $5,800.07. [Tr. p. 45.] The Sheriff made his return, stating:

> "I hereby certify that under and by virtue of the within hereunto annexed writ by me received on the 20th day of November, 1950, I did, on the 21st day of December, 1950, collect from Harold J. Ostly, County Clerk of Los Angeles County (remitted to Sheriff in Superior Court Case 520-858-Foley v. Riverside Iron and Steel Cpn.—with Court Order directing application in Case 522-523) the sum of $5,848.49 and . . . (after deducting his fees) leaving a net balance of $5,800.07 which has been paid to the attorney for creditor by County Warrant, in partial satisfaction." [Tr. pp. 45-46.]

On March 14, 1951, within the four-month period after the last writ of execution was served, Riverside filed its voluntary petition in bankruptcy and was adjudicated a bankrupt. [Tr. p. 46.]

Applicable Statutes.

1. Section 542b, *Code of Civil Procedure of California,* provides in part:

> "An attachment or garnishment on personal property . . . shall, unless sooner released or discharged, cease to be of any force or effect and the property levied on be released from the operation of such attachment or garnishment, at the expiration of three years after the issuance of the Writ of Attachment under which said levy was made; and the property levied on shall be delivered to the defendant on his order. . . ."

2. Section 688 of the *Code of Civil Procedure,* provides in part:

> ". . . until a levy, the property is not affected by the execution; but no levy shall bind any property for a longer period than one year from the date of the issuance of the execution."

3. Section 60a (1) of the *Bankruptcy Act* provides:

> "A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class."

4. Section 60b of the *Bankruptcy Act* provides in part:

> "Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent."

5. Section 67a (1) of the *Bankruptcy Act* provides in part:

> "Every lien against the property of a person obtained by attachment, judgment, levy or other legal or equitable process or proceedings within four months before the filing of a petition initiating a proceeding under this Act by or against such person shall be deemed null and void (a) if at the time when such lien was obtained such person was insolvent. . . ."

Summary of Argument.

It is evident that appellee received payment on account of an antecedent debt within the four-month period prior to the bankruptcy of Riverside. Such payment under the issues before the trial court was a preferential transfer within the meaning of section 60a of the Bankruptcy Act, unless appellee had obtained a lien on said moneys at some period prior to the four-month period which remained valid and subsisting at the time the actual transfer to him was made.

It is appellant's contention that payment to appellee was made, only be reason of the writ of execution served on the Clerk of the Superior Court of Los Angeles County on November 21, 1950, a time within the four-month period. For the reasons to be hereinafter expounded, appellant contends that all the prior levies were either (1) ineffective to have constituted a lien; or (2) had expired and ceased to be of any force or effect prior to November 21, 1950.

In the argument which follows, appellant will analyze each levy or other event that either gave or may have given appellee a lien on the moneys ultimately transferred to him and will discuss the legal effect of such levies.

Under Point I, appellant will discuss the writ of attachment of December 5, 1946, and show that under California law the lien acquired thereby expired by December 5, 1949, long prior to the time when appellee received the transfer of money which is the subject of appellant's claim.

Under Point II appellant will discuss the writ of attachment of August 12, 1948. With respect to this levy, appellant will contend that it was ineffective to constitute a lien because the money was in custody of the law and not subject to attachment or executions, and that therefore the findings of the District Court were erroneous.

In Point III appellant will discuss the effect of the writ of execution of June 28, 1949, which the District Court found to be ineffective to give appellee a lien. Appellant contends that this finding is inconsistent with the District Court's finding that the money deposited with the Clerk of the Superior Court was not in *custodia legis.* And that, if in fact the latter finding is correct and the money was not in *custodia legis,* the District Court erred in not finding that the execution writ of June 28, 1949, was effective and that the lien of the earlier attachment merged with it and ultimately expired one year thereafter.

In Point IV appellant contends that the appellee received payment on account of his prior judgment against Riverside only by virtue of the writ of execution served on the Clerk on November 21, 1950, a time within the four-month period of Riverside's bankruptcy, and that this action does not constitute a collaterial attack on the Superior Court order of December 8, 1950.

ARGUMENT.

I.

The Writ of Attachment Served on December 5, 1946, Ceased to Be Effective After Three Years.

A. Under California Law a Lien Acquired by Garnishment on Personal Property Has No Force or Effect After Three Years From the Date of Its Issuance.

The first writ of attachment* which could possibly give rise to a lien antedating the four-month period of bankruptcy was the one served on E. T. Foley on December 5, 1946.

Regardless of the validity of this garnishment, and for the purpose of this appeal, appellant assumes that it was good and effective when served, it ceased to have any force or effect long prior to the time in which appellee received payment on his judgment. This for the reason that under the law of the State of California, a garnishment or attachment on personal property endures only for three years. After that time such levy ceases to have any effect or force.

Thus Section 542b of the California Code of Civil Procedure provides:

> "An attachment or garnishment on personal property, . . . shall, unless sooner released or discharged, cease to be of any force or effect and the property levied on be released from the operation

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*Throughout this brief, the word "attachment" is intended to be used interchangeably with the word "garnishment." Under California procedure a court issues a writ of attachment which may be used to garnish property or credits belonging to a debtor but under the control of a third person. All the levies involved herein were in fact garnishments or executions. (Calif. Code Civ. Proc., Secs. 537-545.)

of such attachment or garnishment at the expiration of three years after the issuance of the writ of attachment under which said levy was made; . . ."

B. An Attachment Lien on Personal Property Cannot Be Extended or Revived Beyond the Three-year Period of Its Existence.

Attachment is purely a creature of statute. The rights and obligations acquired by virtue of such statutory remedy must be measured by the statute itself. *Loveland v. Mining Co.,* 76 Cal. 562, 564-565; *Hamilton v. Bell,* 123 Cal. 93, 95. Thus a reading of the statute makes it clear that, after the three-year period in which an attachment on personal property exists, the lien acquired ceases and is incapable of revivor.

In the *Loveland* case, *supra,* the Supreme Court of California, in answering an argument that the duration of an attachment lien could be extended, stated:

> "As attachment is merely a creature of statute, its existence and operation in any case can continue no longer than the statute provides it may."

And, the rule is expressed in 6 *Cal. Jur.* 2d, 41-42, as follows:

> "The statutes make no provisions for the extension of the lien on personal property beyond the original three-year period. At the end of this time, it therefore ceases to be of any force or effect, and the property is released from the operation of the process."

Based on the foregoing principles of law, it is submitted that the trial court erred in finding that appellee "received said money pursuant to garnishment served on E. T. Foley on December 5, 1946, . . ." [Tr. p. 58,

par. 6.] The levy, in the language of the statute, would have ceased to have "any force or effect" by December 5, 1949, more than a year before appellee actually received the money.

C. The Clerk Did Not Take the Money Deposited by Foley Subject to the Lien of the Garnishment; in Any Event the Lien Would Have Expired.

Appellant submits that the District Court also erred in finding that Mr. Foley deposited the moneys with the Clerk of the Superior Court subject to the lien of the December 5, 1946, levy. [Tr. p. 59, par. 5.]

Under California law a garnishment does not create a lien on any specific fund. The attaching creditor obtains only a potential right or a contingent lien. *Puissegur v. Yarbrough,* 29 Cal. 2d 409. In the event that he obtains judgment against his debtor, he may hold the garnishee personally liable to the extent of the garnishee's indebtedness to the debtor. Calif. Code Civ. Proc., Sec. 544. This liability cannot be transferred to another person. Thus the garnishment levied upon Mr. Foley was ineffective to make the Clerk liable as a garnishee, nor, it is submitted, did it create any lien on the moneys held by the Clerk. *Finch v. Finch,* 12 Cal. App. 274, 284.

In any event, if the Clerk in fact received the moneys subject to the lien, the lien expired three years after its issuance, *i. e.,* by December 5, 1949. Code Civ. Proc., Sec. 542b.

II.

The Writ of Attachment Served on the Superior Court Clerk on August 12, 1948, was Ineffective Because the Money Was in Custodia Legis and Not Subject to Attachment During the Pendency of the Foley Action Appeal.

The second writ of attachment procured by the appellee was the one served on the Clerk of the Superior Court on August 12, 1948. The court below found that appellee received the money not only pursuant to the garnishment of December 5, 1946, but also "pursuant to garnishment served upon the Clerk . . . on the 12th day of August, 1948" [Tr. p. 59, par. 6], and as a conclusion of law held that the latter levy was a "valid writ of attachment." [Tr. p. 59, par. 3.]

It is appellant's contention that the finding and conclusion of the trial court is erroneous for either of two reasons: (1) The levy was ineffective because the fund in the possession of the Clerk of the Superior Court was in custody of the law and immune from attachment or execution; or (2) if not in *custodia legis,* it merged with the lien of the writ of execution served on the Clerk on June 28, 1949, and expired one year after the later date, *i. e.,* by June 28, 1950. This first reason will be discussed immediately below; the second in the following point (Point III) of this Argument.

In amplification of the first reason, appellant submits that the funds held by the Clerk of the Superior Court were necessarily in *custodia legis* and not subject to attachment. The stipulated facts show that the Clerk received the money on or about August 1, 1948, pursuant to an order of the Superior Court in the Foley action. [Tr. p. 39, par. 8, p. 30.] The order, a part

of the court's judgment, provided that Foley was to deposit certain sums of money and that the Clerk should distribute the same to the parties in the Foley action only after the Foley judgment "shall have become final in the court in which this proceedings shall be finally decided." [Tr. p. 41.] The Foley action did not become final until November 20, 1950, when the remittitur on appeal was filed with the Superior Court. Until such time, the Foley action remained pending. (*Code Civ. Proc.,* Sec. 1049; *Turner v. Donovan,* 52 Cal. App. 2d 236; *Pacific Gas & Electric Co. v. Nakano,* 12 Cal. 2d 711; 3 *Cal. Jur.* 2d 674.)

Thus, it is evident that on August 12, 1948, when the Clerk was served with appellee's second writ of attachment, the funds which he sought to garnish were in the lawful custody of the Superior Court, having been placed there pursuant to an order of the Court. *The Clerk as an officer of the court was not subject to the garnishment and it was ineffective for any purpose.* The rule is well settled that property placed in *custodia legis* by order of court is not subject to the levy of a writ of attachment or other similar process.

Dunsmoor v. Furstenfeldt (1891), 88 Cal. 522, 527;

Van Orden v. Anderson, 122 Cal. App. 132, 141;

Culver v. W. B. Scarborough, 73 Cal. App. 455, 457;

Durkin v. Durkin, 133 Cal. App. 2d 283, 294;

5 *Cal. Jur.* 2d 649;

4 *Am. Jur.* 795.

A careful reading of the cited cases shows that money deposited pursuant to an order of court in a pending case

remains immune from attachment until the action is finally concluded. The rationale of the rule, as stated in *Dunsmoor v. Furstenfeldt, supra,* at page 527, is that to permit attachment would "generally delay and embarrass judicial and other official proceedings in the administration of such property." But when all proceedings in an action have terminated and "the officer has nothing more to do with the fund than to pay it over," he becomes subject to garnishment.

In the instant case, appellant submits, that as long as the appeal in the Foley action remained pending, the moneys deposited with the Clerk of the Superior Court were not subject to garnishment or execution.

In order to support its finding that the August 12, 1948, garnishment was valid, it was necessary for the court below to find that the funds held by the Clerk of the Superior Court were not in *custodia legis.* Thus the District Court found that the Superior Court in the Foley action "specifically provided, however, that said fund was *not to be held in custodia legis* and that the Clerk was to pay out said fund to the persons entitled thereto upon final judgment in the action." [Tr. p. 57, par. 4.]

It is submitted that such finding is erroneous. Nowhere in the judgment in the Foley action is there any express order that the funds were not to be placed in *custodia legis,* nor can such intention be implied. On the contrary, the order provided that the money deposited with the Clerk was to remain in his possession until the final determination of the case.

III.

If the Money in the Clerk's Possession Was Not in Custodia Legis the Writ of August 12, 1948, Merged Into the Execution Writ of June 28, 1949, and Appellee's Lien Would Have Expired on June 28, 1950.

Even if the District Court was correct in finding that the funds in the possession of the Clerk were not in *custodia legis,* and that the August, 1948, garnishment was effective, the court still erred in finding that the latter writ had any force or effect one year after the issuance of the writ of execution.

Assuming that the funds were not in *custodia legis,* it must necessarily follow that the writ of execution served on the Clerk of the Superior Court on June 28, 1949, was also valid and should have been given full force and effect. The duration of an execution lien is one year. *Code Civ. Proc.,* Sec. 688.

The question arises: What is the effect upon the duration of a writ of attachment where prior to the three-year period provided by statute for its duration, the party obtains judgment and causes to be served on the garnishee a writ of execution?

The cases construing California law make it clear that the answer is that a writ of attachment cannot endure beyond the one-year period of the existence of the lien acquired by the service of the writ of execution. Upon the service of the writ of execution, the lien, if any, acquired by a prior attachment, merges into the lien obtained by the writ of execution.

Puissigur v. Yarbrough, 29 Cal. 2d 409, 412;

Jones v. Toland, 117 Cal. App. 481, 483;

Durkin v. Durkin, 133 Cal. App. 2d 283, 293-295.

Thus, in *Jones v. Toland, supra,* the court held at page 483:

> "Appellant contends that section 542b of the Code of Civil Procedure, which provides that an attachment or garnishment shall be of no effect at the expiration of three years after the issuance of the writ of attachment, applies to garnishments under execution. In our opinion this section relates solely to proceedings taken prior to judgment, and is not applicable to proceedings upon execution. This is apparent from a mere reading of the statute, which refers to a release of the levy thereunder by dismissal of the action or by entry and docketing of the judgment in the case, such contingencies would not have been mentioned if the legislature had in mind proceedings subsequent to judgment. If the argument of appellant prevailed, the limit of one year upon executions would be absolutely nullified, and three years would be allowed for all executions. The three-year period for attachments and garnishments was considered by the legislature as a reasonable time within which a litigant could subject attached property to any judgment which might be obtained, while the one year limitation was considered a reasonable time for realizing upon the fruits of the judgment, with the right to an alias execution thereafter."

The most recent expression of the California courts is the opinion of the District Court of Appeal in *Durkin v. Durkin* (1955, D. C. A. 1st), 133 Cal. App. 2d 283, 293-295, where the respondents had served a writ of attachment upon their debtor's bank on November 2, 1950. The court held that a valid lien had been created in their favor. Respondents obtained judgment in their action against the debtors on January 8, 1951, and caused a writ of execution to be served on the bank. The court

held that under such circumstances "the writ of execution expired on January 8, 1952, one year after the issuance of the writ and it was not extended by the three-year period in which an attachment endures. The court stated at page 294:

> "These respondents further contend that their attachment continued in force for three years and thus continued the life of their lien until after the property entered legal custody. They rely upon section 542b of the Code of Civil Procedure which declares that an attachment or garnishment on personal property "shall, unless sooner released or discharged, cease to be of any force or effect . . . at the expiration of three years. . . . This, we observe, is not an affirmative statement that a garnishment shall endure for three years unless sooner released or discharged. It is a statement that it shall not endure longer than three years. This is consistent with the traditional concept that the lien of an attachment is merged in the lien of the judgment in the case of real property or with the lien of a writ of execution in the case of personal property. . . . No California decision deciding this precise question has come to our attention. In *Puissigur v. Yarbrough, supra,* 29 Cal. 2d 409, 412, the three-year period against the attachment as well as the one-year period against the execution levy had run. . . . In New York the question has been decided. There, it is definitely settled that the lien of an attachment upon personal property merges and terminates in the lien of the execution levy. (Castriotis v. Guaranty Trust Co., 229 N. Y. 74 [127 N. E. 900, 902]; Marks v. Equitable Life Assur. Soc., 109 Appl. Div. 675 [96 N. Y. S. 551, 552]; and earlier cases cited in each.)
>
> "Accordingly, we hold that the same rule obtains in California. . . ."

If appellant's analysis is correct the lien acquired by appellee by virtue of the August 12, 1948, writ of attachment would have merged with the lien obtained by virtue of the writ of execution of June 28, 1949, and would have expired by June 28, 1950, approximately five months prior to the time appellee obtained a transfer of the money, which is the subject of the instant lawsuit.

To avoid the effect which appellant believes he has demonstrated results if the funds were not in *custodia legis,* the District Court found that the writ of execution of June 28, 1949, was ineffective and that the "fund in the hands of the Clerk was not subject to a writ of execution under Section 688 of the Code of Civil Procedure." [Tr. p. 57, par. 5.]

It is evident that this finding is wholly inconsistent with the finding that the fund was not in *custodia legis.* The two findings cannot be reconciled. If, on the one hand, the fund was not in *custodia legis,* as the court below found, and therefore subject to a writ of attachment, it is submitted, that the court should have also found that the fund was equally subject to a writ of execution. It would follow, in accordance with the cases cited above, that the lien acquired by the August, 1948, attachment expired on June 28, 1950, *i. e.,* one year after service of the writ of execution.

On the other hand, if the fund was in *custodia legis* during the pendency of the appeal in the Foley case, neither of the above mentioned writs was effective to give appellee a lien on the money held by the Clerk.

Appellant believes that the latter alternative correctly expresses the effect of the writs under California law and should be followed.

IV.

Appellee Obtained the Funds in Issue Only as a Result of the Writ of Execution Issued on November 21, 1950, a Time Within the Four Months Before Bankruptcy.

On November 20, 1950, the remittitur in the Foley action was filed in the Superior Court. The next day appellee caused a new writ of execution to be served on the Superior Court Clerk. [Tr. p. 47.] When the funds were not forthcoming he filed an affidavit in the Foley action and obtained an order to show cause. After a hearing, the Superior Court directed the Clerk to pay over to the Sheriff the sum necessary to satisfy Wood's judgment. The language of the order clearly shows that it was made by reason of the November 21st writ. Thus the court ordered that the money be paid:

> ". . . in response to the writ of execution issued in that certain action (Wood v. Riverside) . . ." [Tr. p. 44.]

And the Sheriff in returning the writ certified in his Sheriff's Collection Return as follows:

> ". . . that under and by virtue of the within hereunto annexed writ by me received on the 20th day of November, I did on the 21st day of December, 1950, collect . . . the sum of $5,838.49. . . ." [Tr. p. 45, par. 14.]

The trial court found that the writ of execution of November 21, 1950, was effective and that appellee received the money pursuant to such writ. [Tr. p. 58.] Appellant has no quarrel with this finding but contends that the foregoing argument has demonstrated that it was the only writ valid and subsisting at the time appellee received the money.

The failure of the Clerk to honor the writ caused the Superior Court to issue its order of December 8, 1950, directing the Clerk to pay over to the Sheriff the sums due on appellee's judgment against Riverside. Within four months after this writ and order, Riverside filed its petition in bankruptcy.

Thereafter appellant commenced this action in the District Court to recover the money received by appellee. The District Court held that such action constituted "a collateral attack upon a final order" of the Superior Court to pay the appellee the money. . . . "in satisfaction of the writ of execution issued November 21, 1950." [Tr. p. 60, par. VII.]

Rather than attacking the order, appellant seeks to rely upon it. Appellant does not contend that the Superior Court's order was erroneous. In fact, he contends the December 8, 1950, order and the Sheriff's return thereon, show that appellee received the money only by virtue of a writ of execution which was issued within the period of four months prior to the bankruptcy of the Riverside Iron and Steel Corporation. The question of the preference could not have been litigated in the Superior Court at the time the December 8, 1950, order directing payment to appellee was made for the reason that Riverside was not then in bankruptcy.

V.
Conclusion.

Appellant submits that the record conclusively shows that all the writs of attachment and executions served prior to November 21, 1950, were not effective to give appellee any lien on the funds he ultimately received or the lien, if any acquired, ceased to exist, by reason of

the statutory limits on their duration, prior to November 21, 1950. Appellant believes that the conclusion must be reached that the only subsisting lien on the funds was the one which arose through service of the writ of execution of November 21, 1950. As shown by the argument, this lien was obtained within the four-month period prior to the filing of the petition in bankruptcy of Riverside.

The District Court, appellant submits, was in error in finding that appellee had a valid lien on the money which antedated the four-month period prior to bankruptcy. Appellant therefore urges this court to reverse the judgment and remand the case for further proceedings on the issues reserved for determination in the District Court.

Respectfully submitted,

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